SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
*JUDGE*

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

July 19, 2011

Ben Roten
SBI # 0052
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

**RE: State of Delaware v. Ben Roten**
**Def. ID No. 0907011738**
**Letter Opinion**

Date Submitted: May 12, 2011

Dear Mr. Roten:

This is my decision on your Motion for Postconviction Relief. You were convicted of Assault in a Detention Facility. The conviction arose out your physical attack on another inmate, John Jordan. You, Jordan and 12 other inmates were housed together on a tier at the Sussex Correctional Institution. The tier was one of two in the building and consisted of 14 cells, showers, and a large day room. The day room had a television, table, chairs, and hot pots for cooking. You and the other inmates were free to move throughout the tier except for the four times during the day when inmates are locked in their cells. On March 20, 2009, Jordan was in his cell repairing a broken wire on one of the ear buds he wears when listening to his television set. He was using an electric cord to burn the coating off of the broken wire, which created some smoke. You and another inmate were in the cell next to Jordan smoking cigarettes. You got angry at Jordan because you thought the

smoke from his repair job would attract attention to you and get you in trouble because smoking cigarettes is prohibited. You and Jordan got into a verbal altercation, which ended up with you telling the other inmates that Jordan was incarcerated for raping his daughter and Jordan telling the other inmates that you were incarcerated for beating up a woman. The verbal altercation ended and you and Jordan went back to your respective cells. About 20 minutes later you ran into Jordan's cell and threw a bucket of boiling water on him and then hit him in the head with a dust broom. Jordan managed to get away, but was badly burned. After the incident, you wrote a letter to your girlfriend admitting that you had thrown boiling water on another inmate. The Department of Correction intercepted the letter and the State used it against you at your trial. I sentenced you to serve 25 years at Supervision Level V, followed by six months at Supervision Level IV Work Release.

The Supreme Court affirmed your conviction in a decision dated October 4, 2010.[1] You were represented at trial by Assistant Public Defender John P. Daniello, Esquire. The State was represented at trial by Deputy Attorney General Melanie C. Withers, Esquire. Both have submitted affidavits in response to the arguments you raised in your motion for postconviction relief. You argue that (1) your Fourth Amendment rights were violated when the Department of Correction read and seized the letter that you tried to mail to your girlfriend, (2) your First Amendment rights were violated when the Department of Correction read your outgoing mail, (3) your Fourteenth Amendment rights were violated when the Department of Correction violated its policy on incoming publications, (4) the Court erred when it did not allow Daniello to tell the jury that Jordan was convicted of

[1] *Roten v. State*, 5 A.3d 631, 2010 WL 3860663 (Del. Oct. 4, 2010).

raping his daughter, and (5) Daniello was ineffective because he (a) did not object to the admission into evidence the letter that you tried to mail to your girlfriend, and (2) did not object to the exclusion from the jury of the fact that Jordan was convicted of raping his daughter.

The arguments in grounds one, two, three and four are barred by Superior Court Criminal Rule 61(i)(3) because you could have raised them in your direct appeal, but you did not do so. In order to avoid the procedural bar of Rule 61(i)(3), you must show that there was some external impediment that prevented you from raising your claims[2] and that there is a substantial likelihood that if your claims had been raised on appeal, the outcome would have been different.[3] There is nothing in your Motion for Postconviction Relief that even addresses, let alone satisfies, these requirements. Even though your arguments are procedurally barred, I will briefly address them.

**I. Fourth Amendment**

You argue that your Fourth Amendment rights were violated when the Department of Correction read and seized the letter you tried to mail to your girlfriend. The Fourth Amendment protects against unreasonable searches and seizures. You wrote a letter to your girlfriend on April 26, 2009. In the letter you stated that "[b]aby I messed a guy up really bad, I threw boiling water on him, and beat him in his head with a wood broom handle." Lieutenant Earl Messick, the Chief Investigative Officer for the Sussex Correctional Institution, started monitoring your outgoing mail after your attack on Jordan

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[2] *Younger v. State,* 580 A.2d 552, 556 (Del. 1990).

[3] *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

and seized this letter. The State introduced this letter into evidence and read it for the jury at your trial. The State's right to read and seize an inmate's non-privileged outgoing mail is well established. In *Stroud v. United States*, the United States Supreme Court, for the first time, established that prison officials may in some situations seize non-privileged mail sent from prisons by an inmate without violating that inmate's Fourth or Fifth Amendment rights. You were on notice that your mail might be opened and inspected. Upon your initial incarceration on January 7, 2004, you signed Department of Correction Form SB-1(01). On this form you authorized the opening of all of your mail. The Delaware Supreme Court has held that in such circumstances an inmate has no reasonable expectation of privacy regarding his non-privileged outgoing prison mail.[4] Thus, you had no reasonable expectation of privacy regarding the letter that you tried to mail to your girlfriend. Accordingly, your Fourth Amendment rights were not violated. This argument is without merit.

**II. First Amendment**

You argue that your First Amendment rights were violated when the Department of Correction read your outgoing mail. The First Amendment protects freedom of speech. Prisoners have a limited liberty interest in their mail under the First Amendment.[5] Prisons may adopt regulations or practices which impinge on a prisoner's First Amendment rights as long as the regulations or practices are "reasonably related to legitimate penological

[4] *Johnson v. State*, 983 A.2d 904, 919 (Del. 2009).

[5] *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).

interests."[6] This issue was also addressed by the Delaware Supreme Court in *Johnson v. State*.[7] In this case the Court held that in evaluating any action involving the reading of an inmate's non-privileged outgoing mail, it is necessary to determine whether "(1) the contested actions furthered an important or substantial government interest unrelated to the suppression of expression; and (2) the contested actions were no greater than necessary for the protection of that interest." Lt. Messick testified at your trial that he opened your mail in an attempt to solve a crime, maintain safety on the tier, find out how many people were involved, and determine if there were going to be any future ramifications from your attack on Jordan. His actions were reasonably related to legitimate penological interests. Moreover, the opening of your mail was minimally intrusive, especially considering that you were on notice that you mail might be opened and read. Lt. Messick attempted to get the information from other inmates, but they either refused to talk, or would not talk on the record, leaving him with no choice but to intercept your mail. You voluntarily wrote the letter to your girlfriend. You voluntarily admitted in the letter to assaulting another inmate. You signed a form acknowledging and authorizing the opening of your mail. The opening of a prisoner's mail is controlled by well-settled precedent. Your First Amendment rights were not violated. This argument is without merit.

**III. Fourteenth Amendment**

You argue that when Lt. Messick seized your outgoing mail that he did not give you the written notice required by Department of Correction Policy 4.5. While you do not

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[6] *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

[7] 983 A.2d 904 (Del. 2009).

explain your argument in detail, I assume that you are arguing that you were not afforded equal protection of the laws, since your mail was opened without notice and due process, which is covered by the Fourteenth Amendment. This allegation is baseless. Policy 4.5 sets forth the policy for incoming publications. Inmates are permitted to receive publications in the mail. This policy allows the warden to reject an incoming publication if he finds it to be detrimental to the security of the institution. If the warden does this, then he is supposed to notify the inmate who was supposed to receive the publication of his decision. This policy only applies to incoming publications, which are defined as "a book, booklet, pamphlet, or similar document, or a single issue of a magazine, periodical, newsletter, newspaper, plus such other materials addressed to a specific inmate such as advertising brochures, flyers, and catalogs." Policy 4.5 is for incoming publications and not outgoing non-privileged mail. Therefore, it does not help you since your complaint is with the handling of your outgoing mail. This argument is without merit.

**IV. Jordan's Criminal History**

You argue that I erred when I did not allow Daniello to tell the jury that Jordan had been convicted of raping his daughter, making it more difficult for Daniello to impeach his testimony. Delaware Rule of Evidence 609 permits a witness to be impeached by evidence of the conviction of a crime. Jordan was convicted of raping his daughter. This is a felony. However, it is not a crime of dishonesty or false statement. A felony conviction may be admitted to impeach the witness if the Court determines that the probative value of it outweighs its prejudicial value. A crime that involves dishonesty or a false statement may be admitted to impeach the witness regardless if it is a felony or not. I determined at the start of trial that Daniello could ask Jordan if he had been convicted of a felony, but that

he could not ask him about the nature of the conviction. I did this because I had concluded that since the nature of Jordan's conviction did not involve dishonesty or a false statement, the details of it would add nothing to an attack on his credibility. I thought this was correct at trial and I remain satisfied that it is correct now. Withers asked Jordan if he had been convicted of a felony. He admitted that he had. Daniello brought out during his cross-examination of Jordan the fact that he had been incarcerated for five years at the Sussex Correctional Institution. Thus, the jury knew that Jordan was a convicted felon serving a long prison sentence. Ultimately, Jordan's credibility was not much of an issue since your admission that you threw boiling water on him and beat him with a broom largely removed the issue of his credibility from the jury's consideration. This argument is without merit.

**V. Ineffective Assistance of Counsel**

You argue that Daniello was ineffective because he did not (1) object to the admission into evidence of the letter from that you tried to mail to your girlfriend, and (2) agreed not to disclose to the jury the nature of Jordan's conviction. In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.[8] First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.[9] Second, the defendant must show that the deficient performance prejudiced the defense.[10] Further, a defendant "must make and substantiate concrete

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[8] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[9] *Id.* at 687.

[10] *Id.*

allegations of actual prejudice or risk summary dismissal."[11] It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing that representation.'"[12] There is no procedural bar to claims of ineffective assistance of counsel.[13]

**A. Admission of the Letter**

You argue that Daniello was ineffective because he did not object to the admission into evidence of the letter that you tried to mail to your girlfriend. Your argument is not factually correct. Daniello did not object to the admission of your letter on constitutional grounds because there were none for him to base an objection upon. However, Daniello did object to the admission of the letter based upon foundational and authenticity requirements. I noted and overruled Daniello's objections, holding that I was satisfied that the letter from you to your girlfriend was authentic and written by you. This argument is without merit.

**B. Jordan's Conviction**

You argue that Daniello was ineffective because he agreed not to tell the jury the nature of Jordan's felony conviction. Again, your argument is not factually correct. Daniello wanted to question Jordan about the nature of his felony conviction. I ruled that Daniello could ask Jordan if he was a convicted felon, but that he could not ask him about

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[11] *State v. Coleman*, 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

[12] *Coleman*, 2003 WL 22092724, at *2, *quoting Strickland*, 466 U.S. at 689.

[13] *Coleman*, 2003 WL 22092724, at *1, *citing State v. Johnson*, 1999 WL 743612, at *2 (Del. Super. Aug. 12, 1999).

the nature of the conviction. For Daniello to do otherwise would have been contemptuous. This argument is without merit.

## CONCLUSION

Your Motion for Postconviction Relief is DENIED.

**IT IS SO ORDERED.**

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary's Office
cc: Melanie C. Withers, Esquire
John P. Daniello, Esquire